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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 985

PAUL JONES, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, etc., *Appellant*,

v.

DEWEY HEALING, Chairman of the Hopi Council of the Hopi Indian Tribe, etc., and ROBERT F. KENNEDY, Attorney General of the United States, on behalf of the United States

Appeal from the United States District Court for the District of Arizona

BRIEF IN OPPOSITION TO THE HOPIS' MOTION TO AFFIRM

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Pursuant to Rule 16(3), appellant files this brief in opposition to the Hopis' Motion to Affirm, hereinafter "M/A."

That motion, stripped of its *ad homines* references to "Navajo depredations" (M/A 9), "Navajo aggression"

(*ibid.*), "trespass and sheer weight of numbers" (M/A 10), "aggression and encroachment" and "constant depredations and pressure" (M/A 15), stripped also of its allegations that facts have been misstated, most of which do not call for present resolution or even contradiction, actually serves to establish, not that this appeal by the Navajos should be disposed of without any hearing, but rather that the issues tendered by the Navajos involve questions of genuine substance.

First. The Navajos' first question on appeal is whether they were entitled to an exclusive interest in those non-Hopi portions of the 1882 Executive Order Area where they had been settled by the Secretary, or whether, as the court below held, they were entitled in those portions only to "joint, undivided and equal rights and interests both as to the surface and subsurface" together with the Hopis.

1. At the heart of this question is the Executive Order itself, which set apart the area "for the use and occupancy of the Moqui,[1] and such other Indians as the Secretary of the Interior may see fit to settle thereon." We said (J.S. 6) that, "As originally recommended by the Hopi agent in the field, an area of land for the exclusive use of the Hopis was in contemplation (Op. 116-118, 120); the 'and such other Indians' clause was added by the Commissioner of Indian Affairs in Washington before submission to and signature by the President (Op. 118)."

We confess ourselves at a loss to understand why that simple statement of fact, which is fully supported by the references cited, can properly be objected to by the Hopis (M/A 4-5), or on what basis an area thus created can correctly be referred to as the "Hopi Executive Order Reservation" (see the terms of the Hopis' cross-appeal as set forth at J.S. 22-23; see also J.S., No. 1050, p. 3), in

[1] "The words 'Moqui' and 'Hopi' refer to one and the same Indian people." Fdg. 9, Op. 210.

the face of the executory interest that the Executive Order conveyed to any and all other Indians who might be settled in the area by the Secretary. Throughout, as must even now be apparent, the thrust of the Hopi argument ignores the "and such other Indians" clause as though it were a bad dream that would somehow disappear if only it were repeatedly passed by without mention.

2. It is not now necessary to consider whether any Navajos were settled by the Secretary in the 1882 Executive Order Area prior to 1931; for present purposes it is quite sufficient that, as the court below held and found (Op. 46, 162, 216), they were so settled in 1931.[2] On that footing, the question is whether this settlement gave the "such other Indians," i.e., the Navajos, only a joint tenancy with the Hopis in respect of the Navajo portion, leaving the Hopis with exclusive rights in the rest; or whether the Navajos as the only other tribe later settled in the area under the terms of the Executive Order became entitled to equality with the Hopis, so that each was entitled to exclusive use and occupancy in its respective portion of the Executive Order Area. The court below espoused the former alternative, which the Navajos for reasons already set forth (J.S. 15-21) deem entirely erroneous. These are obviously matters too weighty to be disposed of on motion.

3. It is the Hopis' position that the Secretary by 1931 was no longer empowered to settle any Navajos in the Executive Order Area because of the supposed prohibition in the Acts of 1918 and 1927 (J.S. 5; J.S., No. 1050, pp. 14-15), which forbade the creation of, additions to, or

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[2] Finding 21 (Op. 213), summarized at M/A 9-10, must be read in the light of Fdg. 36 (Op. 216), which in pertinent part says: "This 1931 blanket and all-inclusive recognition of Navajo rights of use and occupancy is explainable on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation."

changes in the boundaries of Executive Order Indian reservations. See J.S. 22-23; J.S., No. 1050, p. 3.

We have shown (J.S. 18-21) that these statutes, which are certainly not precise or crystal clear on their face, were intended to prevent further Executive Order withdrawals of public lands for Indian use with the consequent removal of such lands from State taxation. To this demonstration the Hopis answer (M/A 14) that the provisions of the Acts are "clear and unambiguous," that we have made "improper references to selected excerpts from the legislative history," and that we have resorted to "strained processes of deduction."

Significantly enough, the Hopis do not adduce any relevant passages from the legislative history not cited or quoted by us; and we are confident that none are available. What this legislation involved was a floor amendment, actuated by a single motive duly expressed by its sponsor; this amendment added a proviso which is far from clear on its face; and the remarks of its sponsor and of those like-minded make it perfectly clear that the supposed absolute prohibition had nothing whatever to do with the power of the Secretary to divide an existing Executive Order Area among the several Indian tribes for whom it had originally been set aside, and which, in consequence of being thus set aside, had already been withdrawn from local taxation many years before.

We can understand the Hopis' unhappiness over the shattering of the 20-year old myth regarding the scope of the 1918 and 1927 Acts that had hitherto so strongly supported their contention—and that had for so long prevented a resolution of the present controversy. But we submit with confidence that the legislative history we presented was alike accurate, complete, and competent.

It seems sufficient therefore to remark that not only the Navajos' first question here but also the subsidiary questions necessarily involved therein plainly qualify as issues

of substance; that even at first blush the rulings below on those issues are shown to be probably wrong; that on further examination those rulings will be shown to be clearly wrong; and that the case is accordingly inappropriate for adjudication on the appeal papers.

Second. The Navajos' second question on this appeal concerns the power of the Secretary to unsettle them within the Executive Order Area after he had once settled them therein; specifically whether, after approval of the first Hagerman report (J.S. 8-9, and references there cited), the Secretary thereafter had power, in 1936 by creation of Land Management District No. 6, and again in 1943 by revision of that District's boundaries, to expel and dispossess many Navajo families (J.S. 9-11, and references there cited).

Although the court below said of earlier action looking to remove Navajos from the Executive Order Area, "They could not have been removed if they had been settled in the reservation by Secretarial authority" (Op. 31), none the less its final judgment gave effect to the removals effected in 1943, where, in the course of extending the boundaries of District 6 for the Hopis' benefits, a large number of Navajos were heartlessly uprooted (Op. 61-62, 195).

The Hopis argue that the 1931 line was never intended to be final, and that the 1936 line was only tentative (M/A 15). We disagree; but in any event we would urge alternatively that even if the Secretary had been free to alter the 1931 line, he was not empowered in the process to dispossess and unsettle any Navajos whom he had once duly settled. But, on either basis, we submit it is clear that the extent and indeed the very existence of the Secretary's power to unsettle in 1936 and 1943 Indians whom he duly settled in 1931 present issues of substance that require full presentation and plenary consideration of the conflicting contentions on both sides.

Third. The Hopis ask the Court to hear argument on their contention (J.S., No. 1050, Question 1) that the Secretary of the Interior had no power to settle any Navajos in the Executive Order Area in 1931, while simultaneously asking for summary affirmance of the Navajos' appeal, which poses questions concerning the consequences of such a settlement, and the Secretary's power to effect a subsequent unsettlement. Thus the Hopis say that while the existence of the Secretary's power to settle the Navajos presents a substantial issue, questions going to the extent and the consequences of such power do not. Otherwise stated, they contend that while there is substance in their present effort to enlarge the Hopi recovery, there is none in the Navajos' appeal that seeks to diminish the Hopi recovery.

In those circumstances we are necessarily constrained to point out that our earlier diagnosis of the Hopi fixation (J.S. 16)—"What is Hopi is mine, what is not Hopi is also mine"—has now been fully and indeed dramatically confirmed.

CONCLUSION

For the foregoing additional reasons, this Court should note probable jurisdiction of this appeal, as well as of the Hopis' cross-appeal in No. 1050.

Respectfully submitted.

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